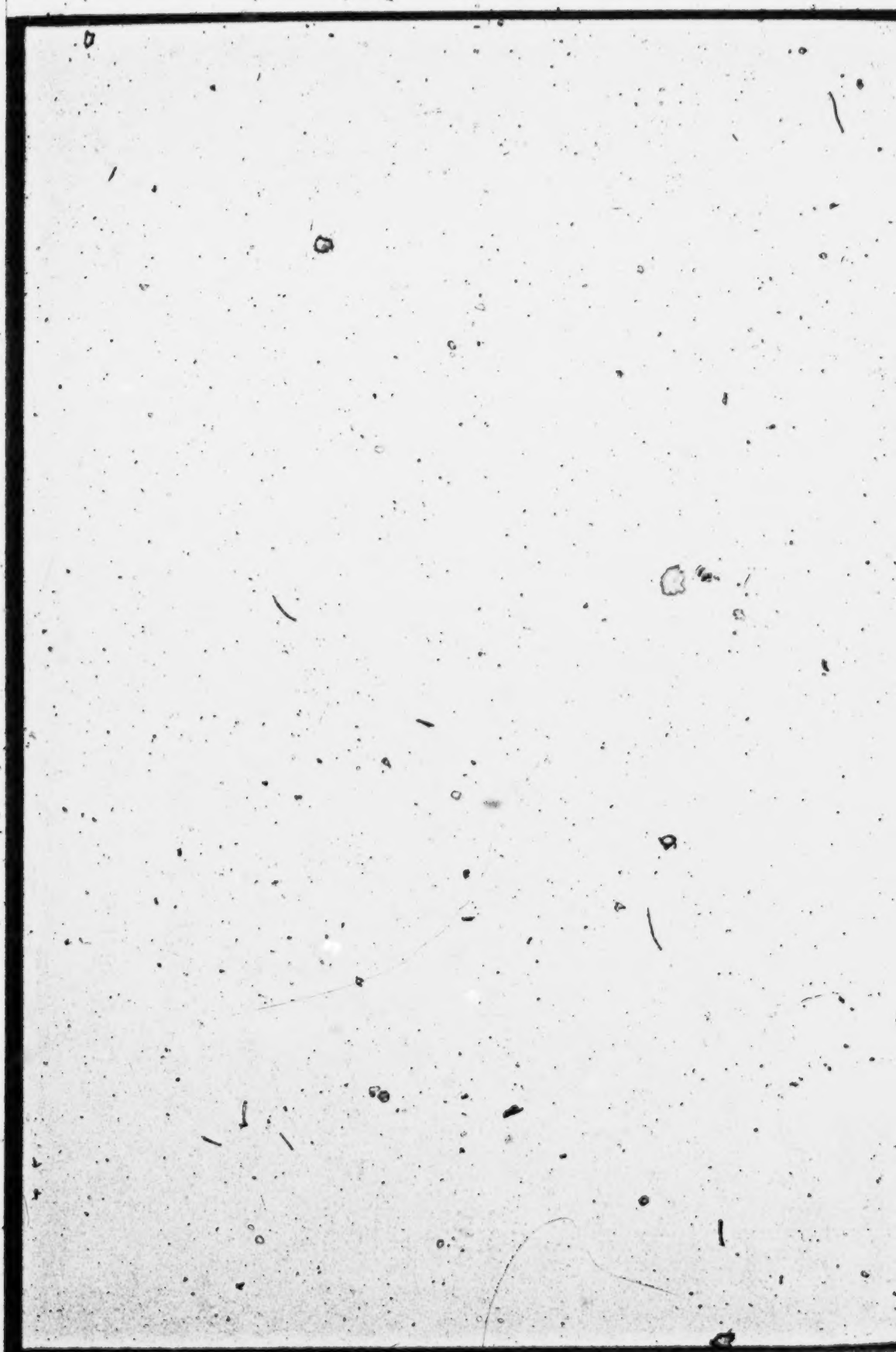

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 41

SAM UMANS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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Statement

This brief is submitted in reply to the brief submitted on behalf of the United States.

Argument

1. A government agent's brief summary of portions of witnesses' affidavits, being the entire grand jury testimony, is insufficient evidence to support an indictment.

The Government argues that since there is no cross-examination or other means of testing evidence through an adversary process in the grand jury, no formalized requirements as to the kind or quantum of evidence were

intended and the protection to the accused lies solely with the "conscience of each member of the grand jury" (Gov't Br. p. 13). The same argument could be made in opposition to challenged search and arrest warrants based upon affidavits of law enforcement officers or other persons. There is no cross-examination or testing through an adversary process of the person who submits an affidavit in support of a warrant. Nevertheless, judicially enforceable standards are imposed upon law enforcement officials to insure that the individual's constitutional right to be free from arrests and searches, except on probable cause, is protected. The safeguard to the accused to be free from arrests, searches and indictments except on probable cause should lie not only with the conscience of the police officer and the prosecutor but in a very material way with the imposition of reasonable judicially enforceable standards, without which the right to be indicted by a grand jury becomes an empty shell.

The Government argues that there was no need for the prosecutor or the grand jury to call the witnesses who furnished affidavits because the existence of "wide scale corruption" in the Internal Revenue Service had been established before a previous grand jury and it was reasonable that the grand jury which indicted petitioner should conclude "on the basis of statements by seven internal revenue agents that each of them took money from petitioner to influence his official action, that he was probably guilty of bribery" (Gov't Br. p. 16). There are several reasons to reject this argument. First, not only is there nothing in the record to support the conclusion that wide scale corruption had been established before a different grand jury but, in addition, no evidence before a grand jury other than the one which returned the indictment here should be used to support the indictment in this case. Second, even if the grand jury that indicted petitioner heard evidence of wide spread corruption in the Internal Revenue Service, that is no reason to enmesh any particular individual in the web of that corruption on the flimsy

evidence presented to the grand jury in this case. Third, it is inaccurate to state that the grand jury concluded that petitioner was "probably guilty" of bribery on the basis of statements by seven internal revenue agents (Gov't Br. p. 16). This grand jury did not have before it the statement of any one of the internal revenue agents. Instead, it had a government employee's brief summary of pieces of paper which purported to be affidavits of these witnesses.

The Government in its brief to the Court of Appeals and in its brief to this Court has made statements about the evidence before the grand jury which returned the indictment in this case. In the Court of Appeals the Government characterized the testimony as a revenue agent's brief summary of affidavits. In this Court the Government states in its brief that the grand jury did not ask the revenue agent to produce the affidavits for its examination and that the agent who testified before the grand jury did not simply say that he had information from an undisclosed source that petitioner had violated the law (Gov't Br., pp. 16-17). The Government does not state who he was or what he did say. However, it is apparent that the agent, whoever he was, did not witness the vast majority of the affidavits he summarized and probably never spoke to or saw most of the witnesses whose affidavits he summarized. The affidavits contain the names of the Government agents who witnessed them. (See Gov't Exhs. 101, 108, 119A, 126, 149). Most of the affidavits have the names of different agents so that there is no one agent who witnessed more than a few of the affidavits. The agent who testified, if he interviewed any witnesses at all, necessarily had no personal knowledge of most of the pieces of paper he was summarizing. Under the circumstances here, we respectfully urge this Court to direct the Government to furnish it and petitioner with a copy of the grand jury minutes, which must be brief indeed, because of the brevity of the portions of affidavits to which the Government alleges were summarized.

The Government argues that all of the individual declarations of the witnesses who later testified at the trial were buttressed by the others and together furnished more than ample probable cause that the petitioner should answer to the charge of bribery (Gov't Br., p. 16). That argument fails to distinguish between the evidence in the Government's files and the evidence before the grand jury—two vastly different things. See *Aguilar* v. *Texas*, 378 U. S. 108, 109, fn. 1 (1964). It also shows that the Government equates the two and thereby usurps the function of the grand jury.

Whether or not the affidavits of the witnesses, had they been presented to the grand jury and properly identified by the agents before whom they were sworn, would have furnished probable cause to indict is not the question here. Whether or not the internal revenue agents before whom the affidavits were sworn had probable cause to believe that petitioner was guilty of the crimes charged is not the question here. The issue is whether the brief summary of the agent, which is all the grand jury heard, was sufficient and for the reasons stated in our main brief we believe that it was not.

The Government suggests that the witnesses who later testified at trial were not summoned to the grand jury because courts have been critical of calling *de facto* defendants before grand juries. First, it is not necessary to support our position for the Court to hold that the Government was required to call these witnesses before the grand jury. Second, the Government's position is inconsistent because, as the Government admits (Gov't Br., p. 18), these *de facto* defendants were called before a previous grand jury and their testimony shows that they were *de facto* defendants at that time since each of them admitted taking money from accountants. Third, there can be no criticism of the Government for calling *de facto* defendants before a grand jury if those persons are advised of their rights, are advised that they will be indicted, and are rep-

resented by counsel. See *United States* v. *Cleary*, 265 F. 2d 459 (2d Cir.), cert. denied 360 U. S. 936 (1959). Obviously, those witnesses thought that they would benefit from their cooperation with the Government and, after the trial of this case, each of them received suspended sentences. Fifth, if there is to be criticism of the Government for calling *de facto* defendants before the grand jury, the same criticism can be leveled at it for extracting the affidavits at a time when the witnesses were *de facto* defendants.

The Government states that with one exception the grand jury testimony and the grand jury exhibits of the witnesses who testified before a previous grand jury dealt with transactions with other accountants. The fact is that before the previous grand jury the witnesses were asked to state the names of the accountants from whom they took money. Six out of the seven witnesses who testified before the previous grand jury failed to mention petitioner's name. While those witnesses who did not mention petitioner said, upon prodding by the prosecutor, that there were other transactions which they could not then recall, all but one of the persons who later swore to affidavits implicating petitioner failed to mention petitioner. In addition, the Government did not have its agent summarize the witnesses' affidavits before the same grand jury which heard their live testimony in which they failed to mention petitioner. Instead the agent presented a summary of affidavits to a new grand jury which had no way of knowing that six of the seven witnesses failed to name petitioner when testifying under oath at a previous time. Even assuming that the first grand jury expired when the second grand jury presentation was made, the Government could have informed the second grand jury of the prior testimony. This information might have motivated the grand jury to ask searching questions about the Government's procedure. We believe that under the circumstances of this case the Government was under a duty to inform the new grand jury of the prior grand jury testimony of these witnesses. *Cf. Brady* v.

Maryland, 373 U. S. 83 (1963), particularly, as this Court has recognized, because these witnesses, allegedly accomplices of petitioner, often have "a greater interest in lying in favor of the prosecution rather than against it. . . ." *Washington* v. *Texas*, 388 U. S. 14, 22 (1967).

The Government argues that the prosecutor knew that the affidavits of the witnesses would be furnished to petitioner at trial and therefore the prosecutor was not motivated to have affidavits summarized to avoid having grand jury testimony of these witnesses produced at trial (Gov't Br. p. 19). However, we urge that the Government was motivated by a desire not to create grand jury testimony which might have been inconsistent with the affidavits, particularly in the light of the fact that the witnesses had testified once before and six out of seven of these witnesses failed to mention petitioner.

The Government has appended to its brief a copy of a letter, not part of this record, from the United States Attorney for the Southern District of New York to the Solicitor General about his practice before the grand juries. The United States Attorney denies that there was a policy in effect designed to avoid placing witnesses who have personal knowledge before the grand jury. However, no matter what motivated the United States Attorney's policy before this case, the result was apparently to have most indictments returned without the grand jury hearing any first hand testimony. Thus, the United States Attorney states that "in the ordinary cut and dried case" the practice in the Southern District of New York has been to present before the grand jury, using hearsay evidence, "a concise showing of the existence of clearly sufficient probable cause." We are not told what standards of probable cause the United States Attorney used.

It is important to note that not only is the Government silent about its practice in other jurisdictions in the country but the United States Attorney in the instant case apparently did not follow the procedure outlined in his

letter. He states in the letter that when hearsay was presented he would place before the grand jury "the investigating agent who conducted the numerous interviews in connection with the investigation and who could, therefore, summarize the essential testimony of the various lay witnesses to show probable cause." However, as we explain above, the agent who testified in this case, at best, only interviewed one or possibly two of the witnesses whose affidavits he was summarizing.

The letter from the United States Attorney does indicate that in what is probably the busiest jurisdiction in the country, the grand jury can properly function under a standard of evidence which we are proposing. Thus the letter states that since the decision in the Second Circuit in the *Umans* and *Payton* cases, Assistant United States Attorneys have been instructed to submit to grand juries some first hand testimony of actual witnesses except where serious difficulties or obstacles make this impractical. This of course may go a long way towards insuring an accused of his constitutional right to be tried by a grand jury. But we think this practice should not be at the grace of each of the many prosecutors in the country but should rather be a requirement under the Constitution or at least under edict of this Court under its rule-making power.

2. Statements of witnesses in which they admitted committing other crimes involving moral turpitude should have been submitted to petitioner.

The Government argues that petitioner "never pointed out to the trial court why or how he believed" that the statements of the witnesses which were withheld from petitioner would aid him in his cross-examination and that petitioner merely made a blanket demand for every statement by each government witness, whatever its nature; the Government also urges that petitioner is making an argument in this Court about the utility of the statements not made to the trial court (Gov't Br. p. 21). Petitioner first learned the nature of the withheld statements from the

Government's brief filed in the Court of Appeals. The Government in effect would have this Court amend the Jencks Act 18 U.S.C. § 3500 by adding a requirement that defendants, who have no knowledge of the contents of statements which are not submitted to them, inform the trial court of the manner in which they intend to use statements which they have never seen. There is no such requirement in the Jencks Act and indeed such a requirement would destroy the effectiveness of that statute. The Jencks Act merely requires the defendant to move to produce any statement which comes within the Act and no further showing is necessary. In this case such application was made after the direct testimony of each of the witnessess.

To this very day, without having seen the statements, it is difficult to articulate all of the areas in which they may have been useful. However, in addition to the reasons given in our main brief, it is quite likely that some or all of the statements which fail to refer to petitioner purport to list all of the instances in which the witness received payments from accountants. Effective use for impeachment purposes could have been made of those statements by showing that at one or more times when the witness was purportedly listing each payment he received he failed to mention petitioner.

The Government cites inapplicable legislative history to support its position that the statements petitioner seeks are not within the Jencks Act. Thus, the Government cites a Senate Report which used as an illustration of extraneous matter which need not be produced, statements about another check forgery for which the defendant was not being tried. S. Rep. No. 981, 85th Cong., 1st Sess., page 7. That statement, however, was prepared by a Secret Service agent and contained information about a different check forgery by the defendant about which the agent had not testified and which was not part of the accusation. Obviously, the testimony of the Secret Service agent could not

be impeached by the fact that his report contained evidence that the defendant committed other crimes. In the instant case, the reports in question show that the witnesses, not the defendant, committed other crimes and are relevant for impeachment purposes.

The House Report on the bill which subsequently became the Jencks Act, relied upon by the Government (Gov't Br. pp. 23-24), specifically states that the purpose of the legislation is to establish a statutory procedure for the production of statements of Government witnesses for the use by defendants "who seek to attack the credibility of such witnesses." H. Rep. No. 700, 85th Cong., 1st Sess., page 2. It also shows that the kind of reports which Congress was concerned with protecting from public disclosure were reports prepared by investigatory agencies containing "all information received, whether relevant or not and whether verified or not . . ." which would not only reveal confidential information but which "would also reveal law-enforcement techniques intelligence sources, and the names of confidential informants. . . ." *Id.* at page 3. The withheld reports in this case merely contain statements about error to fail to produce them.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed and the indictment should be quashed.

Respectfully submitted,

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